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No. 88-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTH AMERICAN PHILIPS CORPORATION, U.S. PHILIPS CORPORATION and N.V. PHILIPS' GLOEILAMPENFABRIEKEN

Petitioners,

v.

WINDMERE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD L. FOOTE
R. MARK MCCAREINS
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

Counsel for Respondent

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QUESTION PRESENTED

The question presented is not that set forth in the petition for certiorari, but is simply whether the Federal Circuit Court of Appeals ruled correctly that substantial conflicts in the evidence exist in this case as to cost, intent, and the exercise of monopoly power under section 2 of the Sherman Act, which must be resolved by a jury.

RULE 28.1 LIST

Respondent Windmere Corporation ("Windmere") has no subsidiaries or affiliates to list pursuant to Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied; the holding of the Federal Circuit Court of Appeals was that issues of fact remain which the jury can sift through and determine for either the Philips entities or Windmere. The notion that this conflict in the evidence as to the question of "average variable costs" requires this Court's attention is unfortunate. Indeed, the question presented assumes the contested facts which the jury must decide: Philips did not have simply a "large market share", but was plainly a monopolist with only one competitor, which was removed by Philips' conduct. Further, Philips did not use "profitable prices" but cannibalized its entire division causing a de-

struction of its short-run profits. Finally, the petitioners' question assumes that these prices were "above average variable cost"; a fact which the court of appeals said should be tried by a jury because of the conflicting evidence.

The real and only question presented at this stage of the case is whether the court of appeals was correct in its unmistakably clear holding that questions of fact exist on these issues—and others—which must be resolved by a jury trial. There can be no doubt under the law of the Eleventh Circuit and the pronouncements of this Court that such questions of fact are to be resolved by the jury and the question of the subtleties of antitrust law that may then emerge is plainly dependent upon the instructions used and the jury's solution to factual conflicts under such instructions.

COUNTERSTATEMENT OF THE CASE

The petition for a writ of certiorari should be denied for at least three reasons:

First. Both the trial court and the court of appeals held that Philips, under the evidence, was a monopolist in the sense that Philips controls over 90% of the domestic sales of the relevant product. (A3, 18) Indeed, Windmere was the only manufacturing competitor of the defendant and was eliminated from the industry by the deliberate practices of Philips. (A10-11) The court of appeals reviewed the evidence which supported Windmere's position that the defendant sold its products below average variable cost—wilfully—to maintain a monopoly and eliminate Windmere's competition. (A1-13, 19-21) In this response Windmere does not intend to burden this Court with a further review of that evidence. The Federal Circuit simply said that a jury could find for Windmere on that issue if Windmere's evidence were believed by the jury. (A20) It is hardly necessary to

note that the question before this Court is whether there is evidence to support Windmere's position; Philips' brief and limited review of some evidence, which supports its position, is hardly an answer to this question.

In short, based on the decision of the Federal Circuit, the jury could find that Philips sold its products—intentionally—to eliminate a competitor below average variable cost. No matter what instruction is given to the jury, such a finding would be supported on appeal in every court of appeals. In that sense, there is no conflict among the circuits.

Second. The question presented asks this Court to assume that petitioners' sales were "profitable"; that assumption is regrettable. The evidence presented demonstrated that petitioners' profits were "cannibalized" and short-run profits were destroyed until Windmere's exit; then prices were increased. (A6-9) Windmere has naturally argued the law of the Eleventh Circuit, and its Fifth Circuit predecessor, because this case was tried in the Southern District of Florida. Under decisions of the Eleventh Circuit, a monopolist also violates section 2 of the Sherman Act if its products are sold at unreasonably low prices with the intent to eliminate competition by sacrificing short-run profits in an industry with barriers to entry which are "great enough to enable the (firm) to reap the benefits of predation before new entry is possible." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

The evidence establishes (if believed by the jury) that Philips sacrificed its short-run profits during the time in which Windmere was competing in the market and then after Windmere's elimination Philips raised prices back to the pre-entry level. It is uncertain as of today whether the jury, under a special interrogatory, would find for Windmere

on this theory. There is simply nothing for the Court to review because no jury instructions were ruled on, and the jury may decide the matter in a fashion to make the issue moot. In sum, Windmere respectfully suggests that petitioners' statement of the issue will invite the Court to review the substantial evidence proving petitioners' loss of profits and legal positions of the parties that have yet to be framed with jury instructions.

Third. The petition invites this Court to accept this case on the apparent grounds that the Federal Circuit improperly relied on prior Supreme Court authority. The petition states that the Federal Circuit's opinion is simply wrong: it turned antitrust law "on its head." (Pet. at 3) The apparent basis for that suggestion is a paragraph in the Federal Circuit's opinion citing the Supreme Court's decisions in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946):

> To be sure, Philips introduced evidence designed to show that its actions were legitimate competitive responses prompted by the entry of Windmere into the market. The evaluation of all the evidence bearing on the nature of Philips' actions and the inferences to be drawn from the evidence, was for the jury to determine. If the jury had credited Windmere's evidence and rejected Philips', it could have returned a verdict for Windmere. Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act. *Cf. Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

(A18).

The court of appeals correctly observed that in both *American Tobacco,* and the more recent *Aspen Skiing* decision, this Court affirmed verdicts against defendants based upon section 2 of the Sherman Act. Without again burdening the Court with an extensive review of the facts of those cases, Windmere respectfully suggests that both *American Tobacco* and *Aspen Skiing* stand for the proposition that a monopolist with power over entry and price cannot intentionally create or maintain the condition of monopoly by deliberate practices directed at the monopolist's only rival. In short, what a company may do with a 10% market share may be different from the responsibilities of a company with 90% of the market.

In *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), this Court found that a group of tobacco companies had entered a criminal conspiracy to monopolize interstate commerce by engaging in certain pricing practices to exclude competitors from the market. Thereafter, an entry was made by several smaller companies selling "cheap" cigarettes. The monopolists then cut their prices several times eliminating the cheaper cigarettes from the market. The Court held:

> The petitioners' cuts in their list prices and the subsequent reductions in the retail prices of their products resulted in a victory over the 10 cent brands.

Id. at 806. There was no finding that these price cuts were predatory or below any "cost standard." Rather, they were exclusionary pricing practices that "maintain[ed] the power to exclude competitors." *Id.* at 809. The gravamen of the offense was that "they (were) able, as a group, to exclude actual or potential competition from the field . . . and they have the intent and purpose to exercise that power." *Id.* (citation omitted) Indeed (like Philips) the defendants raised prices after removing the only new entrant.

Most recently the Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), held that a monopolist violated § 2 by refusing to maintain a joint marketing plan to the detriment of its sole competitor. In *Aspen Skiing,* this Court approved a jury instruction that is plainly at odds with petitioners' view and supports the opinion of the Federal Circuit:

> [W]hether Aspen Skiing Corporation willfully acquired, maintained, or used that power (monopoly power) by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes.

Id. at 596. The Court noted that the defendant did not offer any "justification" for its conduct. The Court found a violation of § 2 even though the monopolist's actions in eliminating its sole competitor were not predatory:

> Although Ski Co.'s pattern of conduct may not have been as "bold, relentless, and predatory" as the publisher's actions in *Lorain Journal,* the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.

Id. at 610 (footnote omitted). The mischief of defendant's conduct in *Aspen Skiing,* as here, was that the practice was used deliberately to remove the only competitor with the intent of maintaining a monopoly.

The petitioners erroneously suggest that this Court's decision in *Matsushita Elec. Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) supports Philips' position. The decision, however, in *Matsushita* does not address the appropriate behavior of a monopolist. The plaintiffs in *Matsushita* had 40% of the market; that share had not changed materially in the twenty years in which a supposed conspiracy existed. *Id* at 591. The Court held that "[t]he prospects

of attaining monopoly power seem slight." *Id.* at 590. *Matsushita* concludes that a conspiracy to monopolize cannot be inferred when the industry has experienced twenty years of competition and monopoly power does not exist and is not foreseeable. *Id.*

The court of appeals did not err here in holding that a reasonable jury could find for Windmere by deciding that Philips is a monopolist that sold its products below average variable cost. The Court may well not prefer to accept the invitation to review in depth all of the facts which led the court of appeals to that conclusion. Further, the notion that the court of appeals erroneously invoked this Court's decisions in *Aspen Skiing* and *American Tobacco* is flawed. Under those cases, it is for the jury to decide whether the many acts of the defendant were permissible business decisions or a deliberate, documented intention to destroy competition and maintain a monopoly.

The jury has yet to hear the form of instruction to be used, which may well define one or three theories of liability under section 2 of the Sherman Act. Indeed, the jury has the privilege of deciding all issues, including the "average variable cost" theory for the defense, thereby mooting the pending petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

EDWARD L. FOOTE
R. MARK MCCAREINS
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600